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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

AUG 15 2005

File: EAC 01 230 53139 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner prior to the filing of the appeal. The term "counsel" shall refer to the present attorney of record.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as an assistant pastor. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous work experience as an assistant pastor immediately preceding the filing date of the petition.

On appeal, counsel argues that the director's ruling falls outside the pertinent regulations.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. 1101(a)(27)(C), which pertains to an immigrant who:

> (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
>
> (ii) seeks to enter the United States--
>
> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
> >
> > (II) before October 1, 2003, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
> >
> > (III) before October 1, 2003, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Code of 1986) at the request of the organization in a religious vocation or occupation; and
>
> (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious

worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition."

8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> > (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on April 30, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as an assistant pastor throughout the two-year period immediately preceding that date.

The petitioner has submitted a letter from the president of its board of trustees. This official's signature is illegible, and no printed name appears below the signature. Prior counsel referred to this person only by title, so it is not entirely clear that prior counsel knew the individual's identity. The official states:

> Here in the United States for the past two years, [the beneficiary] has been performing spiritual duties on mainly a voluntary basis and only given what is stipulated as "love offering" as seen fit to sustain him at the discretion of the Church Board. . . .
>
> [The beneficiary] will be performing the duties of an Associate Pastor. . . . These duties include overseeing all Sunday preaching, Sunday school, worship, counseling, Bible studies, prayer meetings and communication services. He would also oversee all administrative functions of the Church such as hiring, reviewing membership applications, supervising, training, disciplining, and discharging members of the staff. In the absence of the Senior Pastor, [the beneficiary] would perform the duties of the Senior Pastor.
>
> As Associate Pastor, [the beneficiary] will be required to work at least 40 hours per week. He will receive an allowance at a rate as determined by the Executive Committee and the Senior Pastor.

The president of the petitioner's board of trustees has specified the duties that the beneficiary "will be performing" but does not clearly indicate what duties the beneficiary has been performing during the two-year qualifying period. Those earlier tasks are described only vaguely as "spiritual duties." The petitioner has also failed to indicate the hours per week that the beneficiary has worked on average. The record contains a separate letter, indicating that the beneficiary already "serves as an assistant pastor," but this letter has not been signed. At the bottom of the letter appears "Rev. .....," the dotted line intended for the signature of an unidentified church official. Because of the absence of a typed name after the typed prefix "Rev.," it is not entirely clear that this letter was written by a minister of the petitioning church, or that the person who prepared the letter knew the identity of the person who was supposed to sign the letter.

The record contains bulletins and promotional materials indicating that the beneficiary has preached and delivered sermons during 2001, but no comparable evidence for 1999 or 2000.

The director denied the petition, noting the absence of tax records and asserting that the record contains no evidence that the beneficiary worked full-time for the petitioner throughout the qualifying two-year period. On appeal, counsel asserts that the regulations do not require that the beneficiary earned a salary or worked full-time during the qualifying period.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Com. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Com 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To hold otherwise would be contrary to the intent of Congress.

Counsel, on appeal, indicated that additional materials would be forthcoming within 30 days. To date, over ten months later, the record contains no further substantive submission and a decision shall be rendered based on the record as it now stands. In any event, counsel has not contested the director's finding that the beneficiary did not work full-time. Counsel's assertion that the regulations do not require full-time employment amounts to a stipulation that the beneficiary worked only part-time; otherwise, this assertion by counsel would be immaterial and irrelevant. Given the above-cited case law indicating that employment as a minister is considered "continuous" only when performed full-time, counsel's statement on appeal contains sufficient information to allow a decision in this matter.

Review of the record reveals another issue. 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulations permit the submission of additional evidence to supplement the above-required types of evidence, but they do not indicate that the petitioner can substitute other evidence instead of at least one of the three required forms of documentation. In this instance, the petitioner has submitted only an unaudited financial statement. Furthermore, the petitioner has not specified what the beneficiary's salary will be, and therefore the petitioner has not provided sufficient information to allow a determination regarding its ability to pay the beneficiary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.